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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§ 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. With the goal of providing a progressive and meaningful remedy, Congress lowered the then-existing common law barriers to recovery by abrogating the defenses of assumption of risk, the fellow servant doctrine and contributory negligence.[2] However, where Congress did

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[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

[2] The defense of contributory negligence is eliminated in favor of comparative negligence by 45 U.S.C. § 53; the assumption of the risk defense by 45 U.S.C. § 54. *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

not specifically alter the common law, the employee's remedy was to be consistent with common law principles.[3]

Subsequent to FELA's enactment, every state has enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact,[4] and each year thousands of claims and lawsuits, are asserted under FELA against AAR member railroads.[5]

This case, in which the plaintiffs alleged exposure to asbestos while employed at the defendant railroad, raises two issues that are of great interest to railroads. The trial court permitted the plaintiffs to argue to the jury that they were entitled to compensation for emotional distress resulting from their fear of contracting cancer in the future despite offering no evidence of any physical or emotional manifestation of their "fear." [*See* Petition at 8-9] In addition, the court instructed the jury to hold the railroad liable not only for any asbestos-related damages caused by the railroad's negligence, but also for *all* such damages, notwithstanding evidence that much of it was attributable to nonrailroad exposure. [*See* Petition at 2] Instructed to compensate plaintiffs for their fear

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[3] *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997); *See* infra p. 16.

[4] Under the Jones Act, which incorporates the substance of FELA by virtue of 46 U.S.C. § 688, seamen are covered by a fault-based compensation system. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[5] From 1996 through 2000, over 32,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

of cancer and to make no deduction for any contribution to plaintiffs' injuries caused by nonrailroad exposure, the jury made an award averaging nearly $1 million for each plaintiff.

The evidentiary requirements for emotional distress claims and the right to apportionment under FELA are issues brought into sharp focus by the rulings below. First, the court rejected petitioner's motion to exclude evidence related to cancer despite the presence of no evidence of any physical or other objective manifestation of an emotional injury. [*See* Petition at 9] Second, inasmuch that with respect to some plaintiffs there was evidence of significant exposure to asbestos at other jobs, and in some cases little evidence of exposure at the railroad [*See* Petition at 8], the court's jury instructions left the railroad exposed to damages for harm it did not cause.

The decision below is of great alarm to the nation's railroads because it encourages and facilitates a torrent of emotional distress claims, and makes railroads insurers of their employees' safety not only while working at the railroad, but also while employed elsewhere. Both issues on which petitioner seeks review arise with regularity in FELA litigation. Moreover, because West Virginia has become a magnet for FELA asbestos litigation, attracting to its courts numerous out of state plaintiffs, these rulings take on far more significance than would be expected given the state being home to only 1.6% of rail workers.[6] Adding to the mix the uncapped liability railroads face in each and every case, the decision below foretells serious financial consequences for the nation's railroads, making this case of utmost interest to AAR and its members.[7]

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[6] Association of American Railroads, *Railroad Facts* 58 (2001 ed.).

[7] FELA damages, unlike under workers' compensation, are uncapped. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132,

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the petition.

SUMMARY OF THE ARGUMENT

The decision by the court below, which pushes railroad liability beyond FELA's intent, presents squarely for review two important issues arising under FELA. The first is whether FELA courts should follow the majority rule by requiring that claims for damages for negligent infliction of emotional distress be supported by evidence of physical manifestation or other objective corroboration of emotional injury. Because FELA suits alleging exposure to asbestos are common—and often include allegations that the plaintiff suffers from emotional distress due to fear of cancer—this issue will continue to confront lower courts.

The other issue arises from the court's instruction which disregarded the principle of apportionment of damages in the face of evidence that some of the plaintiffs had significant exposure to asbestos at non-railroad jobs. That ruling fails to follow this Court's teachings on FELA jurisprudence, and misreads earlier decisions of this Court. Beyond the serious consequence on the petitioner (a total verdict of nearly $5.8 million), this issue is important because it is not uncommon for railroad employees to seek compensation under FELA where there is evidence that causes independent of the railroad employer's conduct are responsible for the employee's disabling condition. Given the open-ended nature of damage awards under FELA, a ruling which makes railroads responsible for non-work-related health conditions has serious consequences for the entire railroad industry.

The West Virginia Supreme Court declined to consider these two important issues. However, despite coming from a

137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

state trial court, this Court should review this case because, as a by-product of FELA's broad jurisdictional provision, plaintiffs can take advantage of liability-expanding decisions in a handful of jurisdictions by bringing large numbers of out-of-state cases in those courts. The case below, coming out of West Virginia, is a stark example of this phenomenon.

ARGUMENT

I. THE ERRONEOUS RULING ON THE FEAR OF CANCER CLAIM WILL HAVE A FAR REACHING IMPACT ON THE RAILROAD INDUSTRY

For the second time within a year, a West Virginia court has permitted a group of FELA plaintiffs who neither have cancer, nor any physical or emotional symptoms related to cancer, to seek substantial damages related to cancer.[8] Again, the one-tiered state appellate system afforded no forum for review of a ruling which surely will encourage additional "non existent" cancer claims. The ruling by the court below is out of step with a growing body of case law in other jurisdictions, and flies in the face of the principle enunciated by this Court calling for "substantial limitations" on emotional injury claims in order to avoid the potential for "nearly infinite and unpredictable liability." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994) This repeat performance erases any doubt that the petition puts before this Court a significant issue arising under FELA which, if unreviewed, has the potential to impact FELA cases arising over a vast geographic area.

[8] Last year, AAR filed an *amicus* brief urging this Court to grant *certiorari* in a case raising the same issues as the case at bar. *Norfolk & Western Ry. v. Dye*, 121 S.Ct. 2593 (2001)

A. FELA Suits Alleging Emotional Distress Stemming From Exposure To Asbestos Are Commonplace And Frequently Are Funneled Into A Few Selected Jurisdictions

The significance of this case is heightened by the fact that occupational exposure claims constitute an increasingly important aspect of litigation under FELA.[9] Substantial numbers of employees and former employees of railroads continue to file FELA lawsuits alleging occupational exposure to asbestos, with the plaintiff often seeking compensation for, among other things, negligent infliction of emotional distress, claiming a fear of contracting cancer at a future time.[10] In many cases, as in the case below, the plaintiff's sole evidence of emotional distress is nothing beyond his or her bare testimony about fear or concern of contracting cancer.

The issue of what kind of evidence is needed to sustain a claim for emotional distress goes beyond just asbestos litigation. It is not uncommon for FELA plaintiffs to claim that exposure to other allegedly harmful substances in the workplace has caused an FELA "injury." *E.g.*, *Baker v.*

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[9] Though FELA was enacted primarily to provide compensation to railroad employees for the physical perils of the job, *Gottshall* at 542, injuries caused by occupational exposure to harmful substances also are compensable. *Urie v. Thompson*, 337 U.S. 163 (1949)(exposure to silica dust compensable).

[10] From 1996 through 2000, over 7,500 FELA suits alleging occupational exposure to asbestos were filed against railroads. Asbestos suits accounted for about 23.7 percent of all FELA suits filed during that five-year period, and an incredible 45.2 percent of all FELA suits filed in 2000. Data compiled from AAR surveys of railroads. *See supra* note 5. While claims alleging emotional distress might arise in various contexts, *e.g.*, in *Gottshall*, the plaintiff alleged distress arising from having witnessed the death of a coworker, such claims tend to arise most frequently in exposure cases.

Norfolk & Western Ry., 514 S.E.2d 448 (Ga. App. 1999)(exposure to diesel exhaust allegedly caused cancer); *Savage v. Union Pac. R.R.*, 67 F.Supp.2d 1021 (E.D. Ark. 1999)(plaintiff alleged exposure to "large amounts of toxic substances."); *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F.Supp. 1119 (N.D. Ill. 1995)(plaintiff alleged exposure to herbicides caused his reactive airway dysfunction syndrome). Whenever there is an allegation that the plaintiff has been exposed to a substance that has been linked to cancer there is a potential claim for damages for emotional distress due to fear of cancer. Thus, the issue raised by the petition is one which can be injected into numerous FELA lawsuits.[11]

Regardless of their merit, the impact of expansive state court rulings, like the one below, is magnified by a confluence of factors which are inherent to FELA litigation. Taken together, these factors allow plaintiffs, after assessing the key issues in their case, to select a jurisdiction perceived as favorably disposed to their claim, a practice that has been elevated to an art in West Virginia.

Patent forum shopping is facilitated by the broad venue provision of FELA, under which railroads are subject to the jurisdiction of the courts in any district in which the railroad does business. 45 U.S.C. § 56.[12] As a result, a large number

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[11] On May 18, 2001, a complaint was filed against CSX Transportation on behalf of a "class" of "several hundred to several thousand workers" alleging exposure to "hazardous organic solvents" claimed to increase the risk of cancer. *Rice et al. v. CSX Transp., Inc.*, (Circuit Court of Marshall Cty., W. Va., filed May 18, 2001)(a copy of this complaint was lodged with the Court by *Amicus* in *Dye*).

[12] By the nature of their operations, the large railroads today do business in numerous states: Burlington Northern Santa Fe operates in 28 states; Union Pacific, Norfolk Southern and CSX each operate in 24 states. *See* Class I Railroad Annual Report to the Surface Transportation Board (Form R-1), submitted by each of these railroads pursuant to federal law.

of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[13] Moreover, even though FELA is a federal statute, plaintiffs can ensure that their suits will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. §1445(a).

Not only does the combination of FELA's broad venue provision and prohibition on removal allow plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum, as *forum non conveniens* motions typically are unavailing. [*See* Petition at 3] For example, to keep FELA cases in St. Louis, a jurisdiction perceived to be favorable for plaintiffs, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[14]

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[13] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991).

[14] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana) ; *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In each case, the railroad's *forum non conveniens* motion was denied in March 2001, with the plaintiff's receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders were lodged with the Court by *Amicus* in *Dye*.)

Consequently, a ruling by a single state court on an important issue arising under FELA can have far reaching effects. By channeling litigation into selected courts, plaintiffs can, and often do, take advantage of favorable rulings regardless of whether they reside, have worked, or claim to have been injured in the forum state. As a result, large railroads find a substantial portion of certain types of FELA claims being brought in a few select jurisdictions among the numerous states in which they operate, at levels far out of proportion with the number of its employees who live or work in that jurisdiction. While West Virginia is a favored jurisdiction for suing the major Eastern railroads, the plaintiff's bar also targets Mississippi, where venue can be established against a number of railroads. A notorious example of this rampant forum-shopping occurred in September, 2000, when a complaint was filed against a number of railroads in Jones County, Mississippi by 990 plaintiffs alleging "exposure to asbestos and other hazardous substances." *Foster, et al. v. Kansas City Southern Ry. Co., et al.* (Civil Action No. 2000-141-CV9, Second Judicial District of the Circuit Court of Jones County, Mississippi)(a copy of which was lodged with the Court by *Amicus* in *Dye*). Only about a quarter of the plaintiffs are Mississippi residents. Just as in the case below, the plaintiffs demand compensatory damages for "emotional upset, mental anguish . . . fear of cancer."

As demonstrated starkly by the petition, West Virginia is a favored jurisdiction for FELA asbestos litigation: there are several thousand asbestos-related FELA suits pending against railroads in West Virginia, many of which have been filed by plaintiffs who do not reside in the state. [*See* Petition at 25-26; Petitioner's Lodging in *Dye*].[15] Left undisturbed, the

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[15] Bringing cases from far and wide into West Virginia is nothing new. *See Norfolk & Western Ry. v. Tsapis*, 400 S.E. 2d 239, 241 (W. Va. 1990)(921 FELA lawsuits brought in Brooke County, of which 704

West Virginia ruling will govern not just a relatively few cases which may have a direct connection to the state, but also a substantial number of claims imported from all over the eastern half of the United States. Moreover, it is clear that the situation in West Virginia can easily be repeated in a few other select jurisdictions, giving a small number of state courts a disproportionate role in shaping federal law governing FELA litigation throughout the nation.

B. This Case Presents An Excellent Opportunity For This Court To Address An Important Issue Left Unresolved In *Gottshall* And *Buckley*.

The evidentiary issue in emotional distress claims raised by the petition was left unaddressed by this Court in its recent FELA decisions, yet it proves crucial in many FELA cases. In exposure cases the emotional distress claim often is the key to a large recovery, as the plaintiff frequently cannot produce evidence of any other significant damages: many plaintiffs are retirees who can make no claim for lost wages; in other cases, the plaintiff offers little evidence of a disability or impairment due to the alleged injury. Because the issue is raised squarely in this case, it provides an excellent opportunity for this Court to provide guidance and assure uniform application of FELA nationwide. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952).[16]

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involved non-West Virginia resident plaintiffs). Only six of the eighteen named plaintiffs in the *Rice* complaint, *see supra* note 11, reside in West Virginia; the others reside in Maryland, Kentucky and Georgia.

[16] The petition demonstrates that the question of the type of evidence necessary to sustain recovery for emotional distress under FELA is subject to a split among the lower courts, though the weight of authority is contrary to the ruling below. [Petition at part I.B.]. For example, recent opinions of federal courts in Georgia have recognized, contrary to the court below, that the relevant holdings of this Court call for a limiting rule on emotional distress claims. The Georgia court adopted "the rule that

Perhaps because FELA was enacted primarily to address the physical perils of railroad work, it was not until nearly 80 years after the statute was enacted that this Court first addressed the question of whether FELA permits a cause of action for negligent infliction of emotional distress. However, the past fifteen years has seen development of FELA jurisprudence on emotional distress claims, in concert with the growing number of cases raising such claims. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court held that a FELA claim for emotional distress was not precluded simply because the plaintiff also might have had the right to arbitrate the dispute under the Railway Labor Act, but, believing the record was insufficiently developed, this Court did not rule definitively on whether such a cause of action exists. 480 U.S. at 564.[17]

In *Gottshall*, this Court answered *Buell*'s unanswered question in the affirmative, while making it clear that such a cause of action is limited to specific circumstances. Noting that "[n]o jurisdiction . . . allows recovery for all emotional harms, no matter how intangible or trivial . . ." and that "significant limitations, taking the form of 'tests' or 'rules' are placed by the common law on the right to recover for negligently inflicted emotional distress . . ." 512 U.S. at 545, this Court held that the most appropriate test for determining

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applies in the vast majority of American jurisdictions: recovery for a claim of negligent infliction of emotional distress requires a plaintiff, in addition to showing impact under *Buckley*, to make a further showing of objective manifestation of that distress." *Dean, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2000) (twelve plaintiffs) (unpublished opinion); *Heirs, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2001) (six plaintiffs) (unpublished opinion) (copies of these decisions were lodged with the Court by *Amicus* in *Dye*).

[17] In *Buell*, the Court did suggest that even if it were to recognize a cause of action for negligent infliction of emotional distress, such a claim would likely be rare. 480 U.S. at 566, n.13.

the availability of a FELA remedy for negligent infliction of emotional distress was the common law "zone of danger" test. 512 U.S. at 554.

Three years after deciding *Gottshall*, this Court addressed a FELA claim for emotional distress arising not from a discrete accident, but rather, from long term exposure to asbestos which, according to the plaintiff, resulted in fear of a future consequence that might occur. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997). In *Buckley*, closing the door on a potential large number of FELA claims for negligent infliction of emotional distress, this Court reiterated that negligent infliction of emotional distress claims are permitted only when an exception to the general rule of nonrecovery is present: "the common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within certain specific categories that amount to recovery-permitting exceptions." 521 U.S. at 429. (emphasis in the original). The Court held that there could be no recovery for the plaintiff, who had been exposed to asbestos but manifested no disease, since the exposure did not satisfy the "physical impact" requirement of the zone of danger test. *Id.* at 430. This case differs from *Buckley* in that the plaintiffs here claim to have contracted a disease (asbestosis), which they assert entitles them to seek damages for emotional distress, albeit distress related to a different disease (cancer) from the one they allegedly have.

While the holding was limited to plaintiffs alleging exposure but manifesting no symptoms of disease caused by the exposure, the majority opinion in *Buckley*, as well as Justice Ginsburg's concurring and dissenting opinion, highlighted some of the inherent problems courts inevitably face in dealing with claims of emotional distress, suggesting that *Buckley* was not the last word on the issue. The Court pointed out that the question at issue was "the existence and seriousness of [the plaintiff's] claimed emotional distress."

521 U.S. at 433-34. After noting that "contacts . . . with serious carcinogens are common", *id.* at 434, the majority opinion summarized the problem:

> But how can one determine from the external circumstances of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated–particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? *The evaluation problem seems a serious one.* (emphasis supplied)

Id. at 435.

While Justice Ginsburg would not have limited recovery for emotional distress to employees within the zone of danger, *Gottshall*, 512 U.S. at 559 (Ginsburg, J., dissenting), her opinions in *Gottshall* and *Buckley* also recognize the importance of the issue raised by the case below. Justice Ginsburg concluded that the *Buckley* plaintiff was not entitled to damages for his alleged emotional injury because he "did not present objective evidence of severe emotional distress . . . . he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health." *Buckley*, 521 U.S. at 445.[18] Justice Breyer's majority opinion in *Buckley*, describing the evidentiary problems that inevitably arise in the context of emotional distress claims, underscored the consistency between the majority opinion

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[18] In contrast, Justice Ginsburg noted that in *Gottshall* "[b]oth workers suffered severe injury on the job, . . . Both experienced not just emotional, but physical distress [weight loss, insomnia, cold sweats, fatigue, headaches and sleepwalking] . . . both [plaintiffs] satisfy the 'physical manifestation' test endorsed by the Restatement of Torts." 512 U.S. at 568-69 (Ginsburg, J., dissenting).

and Justice Ginsburg's concurrence in assessing these problems: "And Justice Ginsburg, too, . . . would limit recovery in emotional injury cases to those who can show more objective evidence than *simply having expressed fear and concern* to supervisors." 521 U.S. at 434. (emphasis supplied)

Though, as Justice Breyer observed, the statistical link between exposure and future cancer risk may be "controversial and uncertain," it is certain that permitting evidence on cancer in every lawsuit where the plaintiff alleges asbestosis will inject a highly emotional and prejudicial subject into numerous cases and likely greatly inflate awards, based on that evidence, for many plaintiffs who never will develop cancer.[19] The highly prejudicial nature of cancer-related evidence is well recognized, and has caused many courts to exhibit great reluctance to allowing such evidence to be presented to a jury. In *O'Banion v. Owens Corning Fiberglass Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992), the court upheld the trial court's order "exclud[ing] evidence relevant to the plaintiffs' claim for damages due to increased risk of cancer or fear of cancer" because of the highly prejudicial nature of such evidence. Similarly, in *Jackson v. Johns-Manville*, 750 F.2d 1314, 1321 (5th Cir. 1985), the court agreed with the defendants that evidence of cancer should not be admitted to show liability in an asbestosis case "because the dire symptoms and consequences of the disease are so well known and feared by the general public that extensive evidence on the matter was likely to cause individual members of the jury to act out of unfair prejudice." This case presents the Court with an excellent opportunity to provide guidance that will permit appropriate compensation for plaintiffs who truly suffer

[19] As petitioner points out, the fact that the plaintiffs may have asbestosis does not increase the likelihood that they will contract cancer. *See* Petition at 7.

serious damages, while maintaining fairness and balance in FELA litigation.

II. BY REFUSING TO GIVE AN APPORTIONMENT INSTRUCTION THE COURT BELOW MISINTERPRETED FELA AND EXPANDED RAILROAD LIABILITY WELL BEYOND THE STATUTE'S INTENT

This case raises a second critical, unresolved issue common under FELA. Again departing from the prevailing common law rule, the court below refused to recognize that in a FELA case, when there is evidence that causes other than the railroad's conduct contributed to the plaintiff's injury, the railroad should be liable for only the portion of the damages caused by its conduct. The growing number of FELA claims alleging occupational exposure to a harmful substance or condition has elevated the importance of the apportionment issue because often the conditions allegedly caused by exposures at the workplace also may be caused by either non-occupational factors, non-railroad exposures, or both.[20]

A. The Court Below Ignored the Fundamental Common Law Principle That A Defendant Is Liable Only For The Harm It Caused

In *Gottshall*, this Court issued a reminder of a long-standing tenet of FELA: that railroads are not "insurers of the safety of [their] employees." 512 U.S. at 543; *See also Inman*

[20] This represents at least the third time that a West Virginia court has refused to recognize the right of apportionment in a FELA asbestos case where the evidence strongly suggested that non-railroad related factors were responsible for at least part of the employees' damages. *Dye*; *CSX Transp., Inc. v. Sirbaugh*, unpublished order, *cert. denied*, 520 U.S. 1139 (1997). No doubt, one of the benefits to plaintiffs of filing so many cases in West Virginia is the strong likelihood of avoiding submission of the issue of apportionment to the jury.

v. Baltimore & Ohio R.R., 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947). Nonetheless, in the case below, the trial court took a significant step in the direction of conferring "insurer" status on the railroad industry. The court's refusal to provide instructions on apportionment of damages–in fact, the court instructed the jury to disregard the principle of apportionment—rendered petitioner liable for damages suffered by its employees that it did not cause. Indeed, the decision below makes railroads the insurers against consequences flowing from not just their own conduct, but also of the conduct of other employers. Under this decision, rail employees with significant exposure to asbestos at other, non-rail jobs, are endowed with the ability to avoid the limitations on benefits mandated by the state workers' compensation laws governing work-related injuries arising in non-rail employment, and to shift the costs of those injuries onto the railroad industry.

Not only does this visit great unfairness on railroads, it ignores a well established and fundamental, yet oft forgotten, feature of FELA: that FELA jurisprudence is to be guided by common law principles. *Gottshall* 512 U.S. at 551. A fundamental principle of the common law is that defendants are liable only for damages that are attributable to their negligence, not for damages that are caused by other, independent acts or conditions. Where two or more causes have combined to harm a plaintiff, only one of which is attributable to defendant's negligence, damages should be apportioned among those causes, assuming there is a reasonable basis for determining the contribution of each cause to the harm. *Restatement (Second) of Torts* §433A.[21]

[21] Traditional common law rules of apportionment applied to divisible harms. The modern common law is evolving toward the concept of several liability even for indivisible harms, based on the principle that each party should be responsible only for the harm it caused. *See*

There is no reason apportionment should not apply to FELA cases; while some courts, like the court below, disregard this principle, others have adhered to it.[22] In *Dale v. Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989), the Pennsylvania Supreme Court ruled that under FELA "liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused." *Id.* at 1041. The *Dale* court went on to hold that

> an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id.

In *Dale*, the plaintiff's injury was partially caused by exposure to asbestos on the job and partially by his pre-existing asthma. In this case, while there was an allegation of asbestos exposure while working for the defendant, there also was evidence that some of the plaintiffs were similarly exposed at other jobs, in some cases for a far longer period than their employment with the railroad. In *Dale*, the highest court in Pennsylvania corrected the erroneous reading of FELA by a trial court; in this case, the highest court in West Virginia has refused even to consider a similarly erroneous decision by a lower court.

Restatement (Third) of Torts: Apportionment of Liability §§ 17, B18 (2000); Petition at 23.

[22] See cases cited in the Petition at 20-22.

B. Neither The Language Of FELA Nor This Court's Prior Decisions Alter The Common Law Rules Of Apportionment

The ruling below represents a striking example of how some courts, by deviating from common law principles, have misinterpreted FELA. The refusal of some courts to recognize the principle of apportionment of damages often grows out of a misreading of prior decisions of this Court, most notably *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957).[23] In *Rogers*, after the Missouri Supreme Court reversed a jury verdict for a rail employee, this Court held that the language of §51 of FELA requires submission of a case to the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. *Rogers* was clear that its holding pertained only to the test for a jury case.[24] There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

Rogers and its progeny have virtually assured that under FELA, assuming some competent evidence is proffered, a jury, and not a judge, will decide whether the elements of a negligence case have been proved by the plaintiff. Ironically, the court below prevented a jury from properly assessing the level of damages for which a defendant may be liable, in contrast to other courts which have recognized the important

[23] *See Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993), both citing to *Rogers* as justification for denying apportionment.

[24] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function*." 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied).

role of the jury on this issue. *E.g., Sauer v. Burlington Northern R.R.*, 106 F.3d 1490 (10th Cir. 1997)("Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494.)

Misinterpretation of *Rogers* by lower courts is not merely of academic interest: it has very real and serious financial consequences for railroads. The purpose of FELA is to provide a remedy for injuries suffered on the job due to the employer's negligence, not a broad insurance plan for rail workers.[25] Rulings that do not allow for apportionment of damages for causes other than the railroad's negligence blur that distinction and render railroads liable for damages they did not cause. This grafts an expensive insurance feature onto an already rich compensation system, under which damages for both pecuniary and non-pecuniary losses are virtually unlimited.[26]

This judicially created insurance feature is especially relevant in the current environment which has seen myriad FELA cases alleging occupational illnesses. *See supra* pp. 6-7. In these types of cases, factors wholly unrelated to railroad employment, frequently may cause part of the worker's disability. Rejection of the right to apportion damages prevents railroad defendants, where there is supporting evidence, from having the jury consider that a plaintiff's condition is largely the result of the independent causes.

[25] Under a separate federal statute, many rail employees can qualify for an occupational disability benefit if disabled, by any cause, from performing their railroad job. 45 U.S.C.§ 231a(a)(1)(iv). This unique benefit, which is part of the Railroad Retirement system is not available to Social Security employees. Rail employees are also eligible for benefits for total disability, as are Social Security workers. 45 U.S.C. § 231a(a)(1)(v).

[26] *See supra* note 7.

By refusing to give jury instructions on apportionment generally recognized at common law, the court below expanded railroad liability under FELA far beyond the bounds that were intended by Congress. This case provides an excellent opportunity for this Court to correct that error and provide clear guidance to lower courts.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Circuit Court of Kanawha County, West Virginia in this case should be granted.

Respectfully submitted,

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